IN THE

Supreme Court of the United States

October Term, 1948.

No. 360.

FRED W. FINK,
Petitioner and Plaintiff-Respondent below,

v.

SHEPARD STEAMSHIP COMPANY,
a Corporation,
Respondent and Defendant-Appellant below.

Petitioner's Reply Brief.

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TABLE OF CASES CITED.

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PETITIONER'S REPLY BRIEF.

Because the issue raised by the decision of the Court below involved only the interpretation of the Clarification Act, our brief was addressed primarily to that point. Respondent apparently has little confidence in sustaining the decision upon that ground, as is evidenced from its own statements made in the Court below, and now seeks to sustain the decision by a direct attack upon the Hust case. In support of this position, the Government repeatedly assumes innumerable facts and conclusions which have no support and are contradicted by the record itself. We are, accordingly, grateful for this opportunity of making reply.

At the outset, respondent represented to this Court that in the Hust case the general agent was held to be an operator because of an admission in the pleadings. Nothing could be farther from the fact. In the trial court, the case was decided from an independent examination of the General Agency Agreement and from other facts proven by the parties. The decision of that Court, holding the general agent to be an operator, was reversed by the Supreme Court of Oregon, which Court, in turn, was reversed

by the Supreme Court of the United States. The decision was based upon the interpretation of the same General Agency Agreement here involved, and the facts in that case. At no point was any consideration given to the fact that there may have been an admission in the pleadings of operation of the vessel, and that fact clearly did not play any part in the decision of the case.

In this case, the Oregon Supreme Court had occasion to pass upon this very point, and held:

> "But it is argued by the Government that the instant case is to be distinguished from the *Hust case* for two reasons, first, because of an 'admission' in the answer in the *Hust case* that the defendant 'operated' the vessel, and, second, because the *Hust case* did no more than decide that the injured seaman was free to bring his action under the Jones Act and did not hold that the agent was vicariously responsible for the tortious acts of the master or boatswain, which is the negligence alleged here. We cannot agree. The admission in the answer in the *Hust case* was construed by this court to go 'no further than to admit operation of the vessel to the extent authorized by the agreement and to the exclusion of any control of the vessel or authority over the crew' (1945 A. M. C. 540, 176 Ore. 696). The alleged admission was not referred to in any of the opinions of the Supreme Court of the United States, and we can find nothing in the prevailing opinions which would indicate that it was relied on as a basis for decision. The other claimed point of difference does not exist, for the negligence in the *Hust case* was precisely the same character as that alleged here, namely, the negligence of the master, the boatswain, and perhaps other members of the crew (1945 A. M. C. 540, 176 Ore. 695). The Supreme Court of the United States so treated the case. The problem was one of vicarious responsibility (328 U. S. 712, 713, 724, 1946 A. M. C. 739)."

The Oregon Supreme Court also found from the Hust decision that the Master of the vessel, as well as the other members of the crew, were all employees of the General Agent, as follows:

> "A careful reading of the (Hust) opinion convinces us that, so far as any question involved in this case is concerned, the Supreme Court of the United States thought and intended to hold that the master of the vessel was an employee of the defendant no less than the plaintiff or any other member of the crew."

All seamen and their counsel likewise proceeded upon the understanding that the Hust decision had definitely settled the issue that the General Agent was an employer of the seamen and the actual operator of the vessel. In the instant case, the petitioner had instituted an action against the United States, as well as this action against the General Agent. After the decision in the Hust case, petitioner's counsel concluded that the suit against the United States was unnecessary for the protection of his rights, and within two weeks thereafter, that action was withdrawn, leaving only the suit against the General Agent. The same practice was followed in numerous other cases throughout the country, upon the same assumption, that the General Agent was the proper party to the suit.

In this case, the Government has not introduced any new evidence to support the facts or conclusions which it now draws, and the same arguments which it made here were most carefully considered by this Court in the Hust case and decided adversely to the respondent's position. The only new evidence in this and the other cases involved in this controversey tends clearly to sustain the decision reached by the Supreme Court in the Hust case. The delivery and re-delivery certificates in evidence in the Gaynor case, for example, prove beyond doubt that the physical possession of the vessels was turned over to the general agents for operation. Moreover, the testimony of the rep-

resentative from the War Shipping Administration is further recognition of this fact by the Government itself, that the General Agent was the employer of the master as well as the crew, as follows (R. 119):

> "By the Court: . . . if the master was going to be discharged, he would have to be discharged by the general agent, wouldn't he?
>
> A. By the man who employed him.
>
> The Court: That would be the general agent?
>
> A. That would be the general agent."

So far as the actual operation of the vessel itself is concerned, the Government representative leaves no room for doubt in this connection, as follows (R. 119):

> "Q. Mr. Settle, will you explain just in a general way the organization of the War Shipping Administration; that is, how it operates with field offices and divisions, and so forth.
>
> "A. Well, the *actual operation* of the vessel has been *entrusted* to agents who have been appointed under the GAA contracts for the reason that the amount of work involved was so immense it was impossible for one organization to handle the entire matter."

Here is testimony from the people in the best position to know, from the very governmental agency involved, and this testimony is in direct contradiction to the representations made by Government counsel.

An examination of the Agreement itself and the conduct of the parties under the agreement discloses that the vessels were turned over to the general agents "lock, stock and barrel". At the oral argument, Government counsel contended that no possession or control passed to the general agent because the General Agency and Berth Agency contracts were identical, and no one has contended that the berth agent is an operator under its contract. This premise finds no justification whatever, as an examination of the

contracts will disclose. Note first that Articles 1 and 2 of the berth agency agreement carefully omit any reference to "management" of the vessels, as the general agent is required to do under the general agency agreement. Article 11 of the berth agency agreement provides that the Government may assume control of the "*business*" of the vessels after fifteen days' notice. Under the general agency agreement, Article 11 provides that the Government may terminate the agreement and assume control of the "*vessels*" themselves after due notice. Article 12 of the berth agency agreement provides that upon termination, "all property" in the custody of the berth agent shall be turned over to the United States. Article 12 of the general agency agreement provides that upon termination, "all *vessels* and other property" shall be turned back to the United States. Moreover, in the case of a berth agent, there are no delivery or re-delivery certificates, as is the case with the general agent when the vessels are turned over to the general agents and then returned to the Government at the termination of the contract. Article 3 of the berth agency agreement requires the performance of certain duties in connection with the handling of cargo and keeping the vessel supplied with provisions and other necessities, and other functions required by the vessel in port. On the other hand, Article 3 of the general agency agreement provides that the general agent must "maintain the vessels in such trade or service as the United States may direct", and "in the absence of such orders the general agent shall follow reasonable commercial practices". Among other things, Article 3 of this agreement requires the general agent to "equip, victual, supply and maintain the vessels", and to procure the master and crew. The "manning" of the vessel is done by the general agent under this agreement in precisely the same way that a private operator in peacetime procured a crew for a privately operated vessel. In this connection, it is significant to note that although the master is technically an employee of the United States, in actual practice,

he is an agent for the general agent. In the case of *Read v. Agwilines* (Civil Action No. 5603, E. D. Pa.), when the War Shipping Administration delivered the vessel to the Agwilines Company, the Captain accepted the vessel as agent for the Agwilines Company, and not as agent for the War Shipping Administration. With respect to the compensation provided by this article of the agreement, it is to be noted that the berth agents were paid in accordance with the services performed in port, while the general agent received compensation for each day that the agreement was in effect, whether the vessel was in any port or on the high seas. Article 7 of the berth agency agreement provides for the reimbursement of the berth agent for certain expenditures in connection with its duties, including sales and other similar taxes paid. Under the general agency agreement, in addition to these expenditures, the general agent is to be reimbursed for "all crew expenditures, including without limitation all disbursements for or on account of wages, extra compensation, overtime, bonuses, penalties, subsistence, repatriation, travel expense, loss of personal effects, *maintenance and cure*, vacation allowances, damages or compensation for death or personal injury or illness, and insurance premiums required to be paid by law, custom or by the terms of the ship's articles or labor agreements . . . for the amount of any social security taxes which the general agent is or may be required to pay on behalf of the officers of the said vessel as agent or otherwise". These provisions demonstrate that the Government and the general agent contemplated that the latter would be responsible for all of these regular operating expenses, none of which are outlined or contained in the berth agency agreement. It is significant to note also that the parties contemplated and intended that the general agent would be held liable, inter alia, for maintenance and cure. This is an obligation which is imposed only upon an operator of a vessel and an employer.

Article 14 of the general agency agreement requires the general agent to exercise all reasonable diligence in making inspections and to arrange for the repair of the vessels covering the hull, machinery, boilers, tackle, apparel, furniture, equipment, and spare parts, including maintenance and voyage repairs and replacements. There is no comparable provision in the berth agency agreement, nor is the berth agent required to do any of the acts set forth in this article.

Article 16 of the general agency agreement, like article 8, involves an indemnification by the Government of the general agent for all liabilities arising out of the operation of the vessel, including that for maintenance and cure. This provision is again significantly omitted from the berth agency agreement.

These and other significant differences distinguish the general agency agreement from the berth agency agreement. The former is clearly an agreement for the operation of the vessel generally, while the latter relates only to the duties of a ship's husband while the vessel is in port. We submit that the respondent is clearly mistaken in its statement to the Court that the two agreements are identical or even analogous.

The record shows, as indicated on page 3 of our brief heretofore filed, that the general agents were operating these vessels under agreements covering all of the departments on board ship. These included agreements with the Masters, Mates and Pilots, the Marine Engineers, and the unlicensed personnel; and they covered every man on the ship from the Captain down to the lowest mess boy. These same agreements provided for the working conditions, wages, duties and other responsibilities in connection with the operations of the vessels. The record shows that all complaints and disputes were taken up with the general agent, and not with the War Shipping Administration, as erroneously alleged by the respondent. Petitioner's Exhibit 11 (R. 70-75) is concerned with intimate details involving the internal management of the vessel in port and

at sea. Complaint No. 1 is concerned with the question as to whether the Firemen's Union or the Steward's Department had the burden of handling ice on board the vessel. Complaint No. 2 relates to the method of serving meals. Dispute No. 3 required the general agent to determine whether the Master had the right to have his meals served in his room or in the dining hall. Note that it is the general agent who fixed the policy governing the internal management of the vessel even with respect to such intimate details. The remainder of the complaints are along the same line, and it is interesting to note that the general agent's representative referred to the masters as "their masters".

The status of the General Agent as an operator is further illustrated by the negotiations with the various governmental agencies, including the War Shipping Administration and the War Labor Board. In 16 W. L. B. reports 23, a controversy was presented between the general agents and the seamen regarding working conditions and wages and hours. The record shows that a representative of the War Shipping Administration discussed the matter with a union representative and advised that he would "*recommend*" to the general agents the adoption of an agreement. This representative then withdrew and stated that the agreement would have to be reached through the regular processes with the general agents. Later on, Admiral Land attempted to use his "*good offices*" to work out the agreement, but met with much difficulty from the general agents. The record is dispositive that the authority was vested in the general agents as though they were an operator in private enterprise. Had the Government been the actual operators, it is to be anticipated that the Administrator would have issued a direct command, rather than a "recommendation" and the use of his "good offices".

Nor did the general agents make any secret of the fact that they were actually the operators of the vessel and employers of the crews. In *Wright v. Eastern Steamship*

Lines (D. C. S. D. N. Y., Adm. No. 152), the general agents obtained a policy of insurance from the Indemnity Insurance Company of North America, and as indicated in the letter set forth on page 23 of petitioner's brief in the *Gaynor* case, the insurance company issued a policy of insurance covering the *captains* and *crews* of the vessels *as employees of the general agent*. In the *McAllister* case, the record discloses that the general agent furnished the personnel on the vessel with various forms, including medical reports, on which it appeared that the general agent was designated as the "*employer*" of the seamen. (Exhibit 4, R. 559). In the *McAllister* case, the officers and unlicensed personnel testified that they were engaged by and considered themselves to be in the employ of the general agent (R. 104-109, 51, 89, 90, 323, 371). Very significant also is the fact that all vessels were authorized to carry the *stack markings* of the general agent, as provided by Operations Regulation No. 111. This was notice to all the world that the vessels were being operated by the general agents.

It is appropriate here to consider the illustration offered by the respondent at the oral argument. It was suggested to the Court that if someone should slip upon the steps of the Court building, that Mr. Waggaman, as an employee of the Government, could not be held personally liable. While we have no quarrel at all with this contention, the illustration does serve to point up the issue here involved. Mr. Waggaman is not an agent of the Government in the sense that the general agent was an agent of the Government. On the contrary, Mr. Waggaman is a part of the Government itself, and his actions are the actions of the Government. The situation would be comparable if the Government engaged a separate agency to maintain and operate the building, under which circumstances that agency would undoubtedly be responsible for the improper maintenance or operation of the building under its charge. Similarly, the general agents are certainly not employees of the

Government, though they may be acting for the Government.

It is pertinent to point out that the Government exercised the same kind of control over many private industries, such as shipbuilding, aviation companies, and other similar businesses engaged in the war effort. Those enterprises were likewise operated under strict regulations of the Government, and were subject to rigid control. In the instant cases, it is not our view that the Government was divorced from the operation of these vessels. On the contrary, the Government did reserve to itself the right to supervise and generally control the entire Merchant Marine, and, in point of fact, the Goverhment was technically, as this Court pointed out in the Hust case, an employer of the seamen. However, as this Court further pointed out in the Hust case, that is not to say that the operating agent was not also liable as an operator and employer. A quoation from the case of *Armit v. Loveland*, 115 F. 2d 308, is peculiarly appropriate at this point, as follows:

> "If the defendants so scrambled their relations as to render it difficult for anyone to say for a certainty whether the plaintiff was employed by only one or by all of them, that should not serve to defeat the plaintiff's right by relieving a responsible defendant. To hold otherwise would be to put a premium upon the confusion which the defendants themselves created. The ones responsible for it should be the ones to dispel it, which they can do by adjusting their respective liabilities inter se. In the circumstances here present we can see no legal necessity for requiring the plaintiff to grope around in search of his employer's identity among corporate entities and individuals, all of whom are shoots off the same stock and engaged in a common activity. A verdict against all three defendants was warranted. Lang, et al. v. Hanlon, et al., 302 Pa. 173."

We respectfully submit that, regardless of any control or supervision exercised by the Government in the operation of the Merchant Marine, it is clear that the general agents exercised a substantial measure of control over the vessels and the seamen, and they are, therefore, necessarily responsible as operating agents, as this Court held in the Hust case, for all incidents arising out of the vessels' operations.

Respectfully submitted,

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